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October 7, 2016

VIA ECF

Hon. Catherine O'Hagan Wolfe
Clerk of the Court
United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

Re: ***Beck Chevrolet Co., Inc. v. General Motors LLC,***
Docket Nos. 13-4066 (L), 13-4310 (XAP)

Dear Ms. Wolfe:

On behalf of Appellant, General Motors LLC ("GM"), we submit this letter brief to address the implications of the New York Court of Appeals' certification decision on the final disposition of this appeal. For the reasons set forth below, the district court's decision should be affirmed.

INTRODUCTION

In its answer to the first certified question, the New York Court of Appeals concluded that it is unreasonable and unfair for GM to determine a dealer's compliance with its contractual sales performance obligations using only its Retail Sales Index ("RSI"), which measures sales effectiveness based upon segment-adjusted state average market share, because RSI "fails to account for local brand popularity." *Beck Chevrolet Co., Inc. v. General Motors LLC*, 27 N.Y.3d 379, 384, 391 (2016). GM is fully aware of the Court of Appeals' concerns regarding the use of RSI and intends to focus on the issues raised in the certification opinion as part of its ongoing assessment of its evaluation process. In the particular case at bar, however, the district court specifically found that GM did *not* rely solely on RSI to determine Beck's compliance with its Dealer Sales and Service Agreement ("Dealer Agreement"). After hearing evidence comparing Beck's performance to neighboring Ford, Chrysler, and Chevrolet dealers, the district court concluded that GM considered and eliminated import bias and brand unpopularity as potential causes of Beck's noncompliance, specifically finding that *no pro-import or anti-Chevrolet bias existed in Beck's Area of Geographic Sales and Service Advantage* ("AGSSA"). In other words, GM's evaluation of Beck's performance actually addressed the two factors that the Court of Appeals found lacking in RSI alone. *See Beck Chevrolet*, 27 N.Y.3d at 391 ("GM's exclusion of local brand popularity or import bias rendered [RSI] unreasonable and unfair because these preference factors constitute market challenges that impact a dealer's sales performance differently across the state."). The Court of Appeals said nothing about the legality of using RSI in conjunction with other evaluative tools, as GM did here. Consequently, the Court of Appeals' opinion, which addresses RSI alone, is not dispositive of the issues, facts, and evidence presented to and analyzed by the district court. Because Beck cannot show that the district court's factual findings are clearly erroneous, the decision dismissing Beck's claim under VTL § 463(2)(gg) should be affirmed.

In its answer to the second certified question, the Court of Appeals held that a franchisor's unilateral revision of a dealer's AGSSA does not automatically constitute a prohibited franchise modification under VTL § 463(2)(ff). *Id.* at 396-97. The Court explained that, while franchisors may not avoid this provision simply by reserving the right to make a change, the Act only prohibits an unfair modification that "substantially and adversely affect[s] the new motor vehicle dealer's rights, obligations, investment or return on investment." *Id.* at 395-96. Even if Beck had adduced any evidence showing that GM's revision to Beck's AGSSA—resulting in a net reduction of three census tracts with a modest increase in sales opportunities and, by extension, sales expectations—substantially and adversely affected Beck's interests (which Beck failed to do), this Court would still have to uphold the dismissal of Beck's claim under VTL § 463(2)(ff) because the undisputed facts showed that GM agreed not to consider these changes to Beck's AGSSA when calculating Beck's RSI under the Participation Agreement. *See* A613 (noting that Beck's 2011 Retail Sales Performance Review and RSI scores were "based on [the] contractual [AGSSA] geography prior to the APR and AGSSA reconfiguration process"). Put differently, Beck has no evidence to suggest, let alone prove, that GM's revision of Beck's AGSSA adversely affected Beck in any way. Accordingly, the judgment dismissing Beck's section 463(2)(ff) claim should be affirmed.

ARGUMENT

I. GM CONSIDERED BRAND POPULARITY AND IMPORT BIAS IN ASSESSING BECK'S COMPLIANCE WITH THE DEALER AGREEMENT.

The Dealer Agreement and the district court's factual findings make clear that GM's process for determining a dealer's contractual compliance is fair and reasonable. While GM uses RSI as one component of its evaluation process, GM agreed to consider *both* RSI *and* any other relevant factors in determining whether a dealer had complied with its sales performance obligations. A157; District Court Opinion, at A1207. During the bench trial before the district court, both parties presented extensive evidence about RSI and the additional factors that GM considers. After considering that evidence, the district court made a number of important findings of fact (outlined in detail below), demonstrating that GM's process specifically considered Beck's allegations of brand unpopularity and import bias. *Id.* at A1205, A1214-A1220. Based upon those findings, the district court ruled that GM's process of using RSI as a benchmark, together with consideration of these additional criteria, is *not* "unreasonable, arbitrary, or unfair" under section 463(2)(gg). *Id.* at A1198, A1220.

As is evident from its certification decision, the New York Court of Appeals did not analyze these factual findings in answering the first certified question. *See, e.g.*, *Beck Chevrolet*, 27 N.Y.3d at 391 (concluding that the RSI metric's "exclusion of local brand popularity or import bias rendered [it] unreasonable and unfair"). In fact, doing so would have been beyond the scope of its review. *See* N.Y. C.P.L.R. § 5501(b) (McKinney) ("The court of appeals shall review questions of law only, except . . . where the appellate division, on reversing or modifying a final or interlocutory judgment, has expressly or impliedly found new facts and a final judgment pursuant thereto is entered."); N.Y. Const. art. VI, § 3(a) (same); 4 N.Y. Jur. 2d Appellate § 570 ("Where a case is brought before the court of appeals on a certified question, finding of facts by the [court below] cannot be reviewed.").

Examining segment-adjusted state average sales effectiveness in the vacuum of the certified question, the Court of Appeals held that RSI—*on its own*—"fails to account for local brand popularity" and other "market-based challenges that affect dealer success" such as "import bias." *Beck Chevrolet*, 27 N.Y.3d at 384, 391-92. Returning to the full context of this litigation, the district court's findings of fact regarding GM's actual evaluation of Beck's sales performance using RSI *and* "other relevant factors" should not be disturbed absent clear error. *Mobil Shipping & Transp. Co. v. Wonsild Liquid Carriers Ltd.*, 190 F.3d 64, 67 (2d Cir. 1999). Upholding the district court's determination here would, in fact, reinforce the Court of Appeals' admonition that GM needs to consider local brand popularity when determining a dealer's compliance with its franchise agreement in every case.

Here, the evidence at trial established that GM uses RSI as an evaluative tool to help dealers identify and capture potential sales opportunities, thereby driving dealer improvement and improving brand market share. *See Beck Chevrolet*, 27 N.Y.3d at 398 (Pigott, J., dissenting) ("It is evident from the record that the RSI is a tool utilized by GM to determine if the franchisee is achieving certain benchmarks, and, if not, the RSI operates as a canary in the coal mine to alert GM that the franchisee needs assistance."); District Court Opinion, at A1211, A1217. In determining dealer compliance with its sales performance obligations, however, Article 9 of the Dealer Agreement *requires* GM to consider "not only the [dealer's] RSI" but "any other relevant factors" and "other mitigating factors which might explain failures to meet the sales targets."[1] District Court Opinion, at A1207, A1211. GM's evaluation of these "other relevant factors" includes assessing so-called "import bias" and Chevrolet brand popularity, as well as geographical, operational, or market-based obstacles that may be impeding the dealer's performance. *See, e.g.*, District Court Opinion, at A1211-12, A1214-15. Only after considering these factors may GM declare a dealer to be in material breach of the Dealer Agreement. A157; District Court Opinion, at A1207.

The district court found that GM does consider local market factors that affect dealer performance and that GM fulfilled its obligations as to Beck. Specifically, the court found that *after* GM determines a dealer's RSI, GM routinely "uses other indices to check the reasonableness" of

[1] Beck's entry into the Participation Agreement does not change this requirement. By its terms, the Participation Agreement merely supplemented the Dealer Agreement and provided that, in the event of Beck's breach, GM would only retain the rights and remedies available under the Dealer Agreement. A129, A132-134.

that score and considers "other mitigating factors" that might inhibit a dealer's sales efforts. *See* District Court Opinion, at A1214, A1211. The court then considered extensive evidence regarding GM's analysis of "local consumer brand preferences" potentially affecting Beck's market area and found, as a factual matter, that GM's evaluation of a dealer's contractual compliance did *not* turn on RSI alone. *Id.* at A1211-12, A1214-15, A1217-19. The court found that Beck's market area was *not* affected by any import bias or anti-Chevrolet brand bias and that GM used other metrics to validate Beck's RSI. *Id.* at A1214-15, A1217. As a result, the district court found that GM's overall process addressed the precise concern the Court of Appeals identified with using RSI alone.

In reaching its conclusion, the district court found that GM specifically considers import bias, *i.e.*, whether customers eschew domestic brands (*e.g.*, Chevrolet, Ford, Chrysler) in favor of import brands (*e.g.*, Toyota, Nissan, Honda), by comparing a dealer's performance to the performance of its domestic competitors in its local market to understand whether the strength of imported vehicles is adversely affecting the sale of domestic vehicles in the local market. *Id.* at A1214 (GM "uses other indices to check the reasonableness of [dealers'] performances, comparing, for example, a local dealer like Beck to local dealers selling Fords and local dealers selling Chryslers, and ascertains from those standards that a weak performer, like Beck, compares poorly against the greater sales performance of the Ford dealer and the Chrysler dealer"). The court found that Beck's two closest domestic competitors—the Ford and Chrysler dealerships located on the same street as Beck and less than one mile away in Yonkers—both *exceeded* their manufacturers' state average sales standards and significantly outsold Beck. *Id.* at A1218-19; *see also* A1325-26; A1050-51 at 339-40; A1093 at 432; A1109 at 467; A1111-12 at 472-73.

Based upon statistical evidence presented at trial showing that Beck was vastly outperformed by both Ford and Chrysler dealerships in Beck's AGSSA, the court found that "imports" were *not* "a major impediment to [accurately] measuring its performance." District Court Opinion, at A1214 ("If imports are, as Beck argues, a major impediment to measuring its performance, that should be true equally to the Ford dealer and the Chrysler dealer, but [GM] shows statistically that that is not so and it is outperformed by Ford and Chrysler in its AGSSA."); A1217 ("[T]he more effective sales performances by Ford was shown by the experts in the very same area, in the very same AGSSA, as Beck. So if Ford can perform and get a much better score in an RSI calculation, why can't Beck? That's a question that suggests that there is an adequate adjustment . . ."). Thus, the record shows that Beck's ability to comply with its contractual obligations was not adversely affected by any "import bias."

The district court also found that, to assess possible brand bias, GM routinely evaluates each Chevrolet dealer's share of the Chevrolet sales made in its local market to understand how the dealer is performing against more distant Chevrolet dealers. *Id.* at A1214-15 ("Another check is to use Beck's performance against neighboring [Chevrolet] dealers, and those statistics show that at least one of them sells more cars, more vehicles, in Beck's AGSSA than Beck does itself."). This "check" is designed to ascertain the extent of Chevrolet brand unpopularity, if any, or to confirm that a dealer is simply losing available sales opportunities to its same-brand competitors. *Id.* at A1214-15. Here, the record evidence established that *within Beck's own AGSSA*—an area where it should be the dominant Chevrolet dealer given its geographic advantage—Beck was actually outsold for two straight years by Curry Chevrolet, a dealer less conveniently located to customers in Beck's AGSSA. *Id.* at A1219; A1120 at 491; A1121-22 at 493-94; A1333. Put differently, customers in Beck's AGSSA were buying Chevrolet vehicles, but the majority of them were doing so from a Chevrolet dealer who was farther away from them than Beck. As GM's expert testified, this "is a confirmation that it's not a matter of a rejection of the brand but a rejection of the dealer." A1133 at 517.

Additionally, the district court found that GM had considered the performance of a neighboring Chevrolet dealer, which had increased its RSI from 47.2 to 124.8 in just two years, while Beck had failed to show even moderate improvement, confirming that *no anti-Chevrolet brand bias was present in the market*. District Court Opinion, at A1218. The court concluded that "the fact that [RSI] identifies dealers who have missed opportunities to increase their sales against competition, intra-brand competition, for example, typifying the great improvement of a Chevrolet dealer named Major in Long Island City, is another indication of fairness." *Id.* at A1217-18.

In sum, GM augmented its RSI metric when it considered the evidence summarized in the preceding paragraphs. In assessing the reasonableness and fairness of GM's overall process, this Court should not disregard the numerous beneficial attributes of that process. Both the district court and this Court recognized that the statute does not demand perfection and that GM's performance standards have "significant virtues." *Beck Chevrolet Co., Inc. v. Gen. Motors LLC*, 787 F.3d 663, 676 (2d Cir. 2015) ("[A]s the district court recognized, GM's performance standards have significant virtues, including ease of administration, predictability, uniformity, and encouragement of innovation in struggling markets. They give GM greater flexibility to demand changes or shut down unproductive dealerships. And, importantly, they appear to represent the industry standard.") While the Court of Appeals concluded that these attributes were not dispositive, they are certainly an important part of a fair and reasonable process.

The Legislature selected the "general and amorphous adjectives 'unreasonable,' 'arbitrary' and 'unfair' [that] are similar to those found in the Uniform Commercial Code and lend themselves to varying interpretations depending on the circumstances of a particular business situation." *Beck Chevrolet*, 27 N.Y.3d at 397 (Pigott, J., dissenting). This flexible standard counsels against "a substitution of judicial for business judgment," and "a distributor acting honestly is entitled to latitude in making commercial judgments." *See, e.g.*, *Coady Corp. v. Toyota Motor Distribs., Inc.*, 361 F.3d 50, 56-57 (1st Cir. 2004). Such an approach is also consistent with the general admonition that "[a]bsent a clear mandate from the legislature, [courts] are disinclined to unnecessarily interfere with the bargains that have been struck between the manufacturers and their distributors." *See General Motors Corp. v. Darling's*, 444 F.3d 98, 109 (1st Cir. 2006).

The Court of Appeals echoed these considerations in its opinion: "Decisions about how best to improve the quality of dealerships and increase dealer sales involve business judgments rightly left to franchisors, and not the courts." *Beck Chevrolet*, 27 N.Y.3d at 394. It further cautioned that "[o]ur interpretation of VTL § 463(2)(gg) should not be understood as an invitation for a court to substitute its opinion for a franchisor's determination of how best to achieve its bottom-line business goals." *Id.* In light of the Court of Appeals decision, GM intends to evaluate how it can improve its overall process. But it is clear from the district court's factual findings *in this case* that GM's evaluation process already addresses the Court of Appeals' concerns regarding the use of RSI in isolation.[2] Because none of the district court's findings in this matter are clearly erroneous, even taking into account the guidance set forth in the certification decision, the dismissal of Beck's 463(2)(gg) claim should be affirmed.

II. THIS COURT SHOULD AFFIRM THE DISMISSAL OF BECK'S MODIFICATION CLAIM BECAUSE GM'S MODEST REVISION TO BECK'S AGSSA NEITHER SUBSTANTIALLY NOR ADVERSELY AFFECTED BECK.

In response to the second certified question, the Court of Appeals concluded that a change to a dealer's AGSSA is not a prohibited modification under VTL § 463(2)(ff) unless it "may

[2] In the N.Y. DMV proceeding that Beck initiated to challenge GM's attempted termination of Beck's franchise, the Administrative Law Judge acknowledged that GM considers "any other relevant factors" before determining that a dealer's poor sales performance constitutes a material breach of the Dealer Agreement to trigger a notice of termination. *See Beck Chevrolet Co., Inc. v. Gen. Motors LLC*, No. FMD 2013-02, at *7 (N.Y. Dep't of Motor Veh. Oct. 6, 2014) (ECF No. 108). While the ALJ and, on appeal, the Administrative Appeals Board (the "Board") ultimately concluded that GM lacked "due cause" to terminate Beck under VTL § 463(2)(e)(2), that determination was based on the unique circumstances that case presented and is governed by a different legal standard than Beck's claim under VTL § 463(2)(gg). In a termination dispute, the franchisor bears the burden of proving that its "notice of termination was issued with due cause and in good faith," and, if the termination is based upon the dealer's sales performance, that the dealer's failure to substantially comply with its performance obligations was not "due to factors which were beyond the [dealer's] control." VTL § 463(2)(e)(2)-(2)(e)(3).

In this case, Beck bore the burden of proving that GM's use of RSI in conjunction with its consideration of "other relevant factors" is an "unreasonable" or "unfair" performance standard. *See* VTL § 463(2)(gg). Citing the Court of Appeals' decision, the Board determined, in the termination proceeding, that a performance standard based on RSI *alone* is unreasonable in downstate New York. *Gen. Motors LLC v. Beck Chevrolet Co., Inc.*, No. 34452, at *12 (N.Y. Dep't of Motor Veh. Admin. App. Bd. May 31, 2016). But the Board did *not* rule that GM's sales evaluation process—which looks at RSI *and* "other relevant factors"—is always unreasonable as a matter of law. Even if it had, the Board's ruling in the termination proceeding does not and cannot trump the district court's factual findings *in this action* that import bias and consumer brand preference were *not* material factors affecting Beck's non-compliance with its contractual performance obligations. *See Mobil Shipping & Transp. Co.*, 190 F.3d at 67. In fact, as this Court recognized, the Board has conceded that these two cases are not preclusive of each other. *See* 787 F.3d at 675 n.6 (citing *Beck Chevrolet*, No. FMD 2013-02, at *6 (deciding that "the issue of reasonableness of the RSI is not precluded by the Federal Court decision as the burden of proof in this proceeding has shifted from Beck to GM" and explaining differences in the evidence put forth and considered in the two actions)); *Gen. Motors LLC v. Beck Chevrolet Co., Inc.*, No. 32580, at *4 (N.Y. Dep't of Motor Veh. Admin. App. Bd. Apr. 29, 2014) (ECF No. 89, at ADD-4).

substantially and adversely affect the new motor vehicle dealer's rights, obligations, or return on investment" *and* is "unfair," meaning "it is not undertaken in good faith; is not undertaken for good cause; or would adversely and substantially alter the rights, obligations, investment or return on investment of the franchise motor vehicle dealer under an existing franchise agreement." *Beck Chevrolet*, 27 N.Y.3d at 395-96. The Court of Appeals explained that "such change must be assessed on a case-by-case basis, upon consideration of the impact of the revision on a dealer's position." *Id.* at 397. Because GM's minor revision to Beck's AGSSA *was not even considered in calculating Beck's expected sales performance under the Participation Agreement* (*see* A613), and because Beck failed to offer any evidence suggesting that GM's modest revision to its market area was undertaken in bad faith or without good cause, or would substantially and adversely affected Beck's interests, the district court's entry of summary judgment for GM should be affirmed.[3]

In 2011, GM notified Beck that it was revising its AGSSA by adding four census tracts in Westchester County and removing seven census tracts in Bronx County. A234-239; A313, ¶¶ 10-11. Although this revision provided Beck additional registration opportunities with a corresponding increase in its sales performance expectations, GM advised Beck that it would use Beck's pre-existing AGSSA to evaluate Beck's performance under the parties' Participation Agreement. *See* A613. Thus, the changes to Beck's AGSSA had *no* effect on Beck's sales obligations or GM's calculation of Beck's RSI and, therefore, could not constitute an "adverse" or "substantial" change to Beck's interests.

Beck claimed that this AGSSA revision—which would have no adverse consequences to Beck during the effective period of the Participation Agreement—constituted an unfair modification of its Dealer Agreement under VTL § 463(2)(ff), but Beck failed to adduce any evidence to support its claim. Beck did not allege facts or offer evidence suggesting that the revisions were undertaken in bad faith or without good cause, and Beck's expert witness could not identify any adverse effects flowing from the revisions. *See* A273, ¶¶ 47-48; A314, ¶ 13. In fact, the only evidence Beck submitted in opposition to GM's motion for summary judgment on this issue was its expert's speculation that the revision "*could* have negative effects for Beck." A314, ¶ 13 (emphasis added).[4]

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[3] The district court originally dismissed Beck's modification claim because the Dealer Agreement reserved to GM the right to revise a dealer's AGSSA in its sole discretion. SPA-52, 54-55. Although the Court of Appeals concluded that "a franchisor may not insulate itself from the requirements and proscriptions of section 463(2)(ff) by contractually reserving in the standard dealer Agreement the power to revise an AGSSA, as GM did in this case," *Beck Chevrolet*, 27 N.Y.3d at 396, this Court may still affirm the district court's dismissal for any reason supported by the record. *Prisco v. A & D Caring Corp.*, 168 F.3d 593, 610 (2d Cir. 1999).

[4] In its Brief for Plaintiff-Appellant-Cross-Appellee, Beck also relies on a GM routing form indicating that Beck's complaint about the proposed AGSSA revisions triggered further analysis by GM. Appellant's Br. at 56-57. However, that same routing form shows that after such analysis was performed, GM concluded that "[n]o changes" to the revised AGSSA should be made. *See* A674-75.

Such conjecture falls far short of the certainty required by VTL § 463(2)(ff)(3), which deems a modification "unfair" only if it "*would*"—not "may"—adversely and substantially affect the dealer's interests. Further, under New York law generally, a party's claim of damages or adverse effects "may not be merely speculative, possible or imaginary," but must instead be "reasonably certain and directly traceable" to the opposing party's violation or breach. *See, e.g.*, *Kenford Co., Inc. v. Erie County*, 67 N.Y.2d 257, 261 (1986); *IDX Capital, LLC v. Phoenix Partners Grp.*, 83 A.D.3d 569, 569-70 (1st Dep't 2011), *aff'd*, 19 N.Y.3d 850 (2012). In short, the record is devoid of any evidence suggesting that Beck's franchise has been "unfairly" modified in violation of VTL § 463(2)(ff). To the contrary, GM's agreement to evaluate Beck's performance using its preexisting AGSSA completely insulated Beck from any effects of the revisions. The district court's order granting summary judgment for GM on Beck's VTL § 463(2)(ff) claim should be affirmed.[5]

CONCLUSION

For these reasons, GM respectfully requests that the Court affirm the decision of the district court.

Respectfully submitted,

SEYFARTH SHAW LLP

/s/ James C. McGrath

James C. McGrath

cc: Russell P. McRory, Esq. (*via ECF*)

[5] Should the Court nevertheless determine that the evidentiary record is insufficient for a ruling on the modification issue, a remand for further fact-finding by the district court is the appropriate disposition of this claim.

SEYFARTH SHAW

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on October 7, 2016, he electronically filed the foregoing Supplemental Letter Brief of General Motors LLC using the CM/ECF system, which will send notification of such filing to the following parties:

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